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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ARTHUR A. WENHAM,
Appellant,

vs.

WILLIAM S. SWITZER,
Appellee.

BRIEF OF ROBT. B. SMITH,

Solicitor and Attorney for Appellant.

R. L. WORD,
Of Counsel.

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C. K. WELLS CO., PRINTERS AND BINDERS, HELENA, MONT.

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STATEMENT OF THE CASE.

Plaintiff and appellant is now, and at all the times mentioned in the record was, a resident and citizen of Cleveland, in the State of Ohio, and the defendant and appellee is now, and at all the times mentioned in the pleadings or record, was a resident and citizen of Butte, in the State of Montana. Prior to October, 1887, these parties had been and were then co-partners or co-owners in the Alta Quartz Lode Mining Claim,

and were running the Monitor tunnel to develop the same. They had never met each other, and their acquaintance, though by correspondence only, was of several years duration, and in a business way was quite friendly and confidential. (See printed record, p. 22.)

The appellee was the manager of their joint mining enterprise at Butte City, Montana. Under these circumstances the appellee wrote to the appellant stating that a one-half interest in a good mining claim, which eventually turned out to be the Burner Lode, could be bought for about $1,500, and asking appellant if he knew of any one wishing to buy. Such correspondence was conducted between the appellant and appellee as resulted in the purchase by the appellee of the half interest in the Burner Lode. After the purchase the appellee refused to convey the property to the appellant, and this action is brought to compel the specific performance of the contract between the parties, and to compel the appellee to execute to the appellant a deed for the one-half undivided interest in the Burner Lode. The issues being joined, the trial was had before the Hon. Hiram Knowles, sitting without a jury. Such findings of fact and conclusions of law were reached by the Court that a decree was entered dismissing the appellant's bill, and entering a judgment for costs in favor of the defendant or appellee; and from the decree so rendered this appeal is prosecuted. The questions involved are as follows:

First: Did the defendant and appellee undertake to act

as the agent of the appellant in the purchase of a one-half interest in the Burner Lode Claim?

Second: Was he limited by the appellant to any particular sum to be expended, or was he to use his own judgment and make the best terms possible in the purchase?

Third: Did the defendant and appellee make the purchase of the one-half interest in the Burner Lode Claim for the benefit of the appellant?

Fourth: Was the action of the defendant and appellee in the purchase of the one-half of the Burner Lode Claim authorized or ratified by the Appellant within a reasonable time?

Fifth: Was the Appellee justified in disregarding the interest of his principal, and treating the purchase as his own without first notifying his principal of his intentions?

Sixth: Ought a specific performance be decreed?

The errors, both of fact and law, in the decision of the Judge below are assigned in the record, and are relied upon to reverse the decision, as follows:

ERRORS RELIED ON.

I.

The Court erred in allowing the Attorney for the defendant to ask the defendant leading questions as to whether or not the defendant wrote to the plaintiff, stating that the

full amount due to the defendant from the plaintiff on account of the purchase of a one-half interest in the Burner Lode Claim should be paid within thirty (30) days from date of said letter, June, 1888.

II.

The Court erred in permitting the defendant to testify over objection of plaintiff as to the contents of a certain letter, claimed to have been written in June, 1887, by defendant to plaintiff, without first demanding the original of the plaintiff, and without first showing the impossibility of defendant to produce the original or a copy of the said original letter.

IV.

The Court erred in deciding that the plaintiff was not bound to take the one-half of the Burner Lode Claim from the defendant after his purchase, and at the price paid therefor by the defendant, to-wit, two thousand dollars.

V.

The Court erred in finding that the plaintiff waited too long after the purchase before tendering to the defendant the balance of the purchase price of the half interest in the Burner Lode Claim.

VI.

The Court erred in finding that the defendant had no authority from the plaintiff to pay more than fifteen hundred dollars for a one-half interest in the Burner Lode Claim.

VII.

The Court erred in finding that the defendant ever wrote to the plaintiff, or that plaintiff ever received at any time notice or a letter from the defendant that the balance of purchase price, to-wit, fifteen hundred dollars, must be paid within thirty days.

VIII.

The Court erred in finding that there never was a ratification of the action of the defendant in purchasing the half interest in the Burner Lode Claim for two thousand dollars.

IX.

The Court erred in finding that the defendant, after assuming to act for the plaintiff, could waive his agency and keep the property for himself, without first giving notice of such intention and tendering back the money received from the plaintiff.

X.

The Court erred in finding that the letter or notification sent by plaintiff to the defendant in answer to defendant's letter of June 5th, 1888, accepting and ratifying the action of defendant in paying two thousand dollars for the half interest in the Burner Lode Claim was not a sufficient ratification of the acts of the defendant in that behalf.

XI.

The Court erred in finding that the plaintiff waited ten months to see whether or not he should ratify or accept the action of the defendant in purchasing the half interest in the Burner Lode.

XII.

The Court erred in finding that the failure of the plaintiff to send the remainder of the purchase price of the half interest in the Burner Lode Claim for ten months after its purchase operated as a forfeiture of any of his rights under said purchase.

XIII.

The Court erred in finding that the defendant had the right of his own accord, without notice to the plaintiff, to declare himself free from further obligation to the plaintiff on account of his agency, and assume to act for himself and retain the property originally purchased for the plaintiff and partially paid for by the plaintiff.

XIV.

The judgment, findings and decree of the Court is against the weight of the evidence, and is not supported by the evidence in said cause.

XV.

The decision, decree and findings of the Court is error in

that the same is against and contrary to the law and the correct rule of law upon the facts found and disclosed in said cause.

The matter of permitting Attorneys to ask leading questions is of course largely within the discretion of the Court, but this discretion should not be extended indefinitely, especially where the witness, as in this case, was a party to the suit. Leading questions that suggest the answer desired are to be avoided.

Greenleaf on Evidence, Vol. 1, Sec. 434.
Phillips on Evidence, Vol. 2. page 888.
People vs. Mather, 4 Wend., 229.
Warrell vs. Parmelee, 1 N. Y., 519.

It may be urged in answer to the above objection that the case was tried before the Judge, and that the rule, excluding leading questions, would be relaxed, and that it was discretionary with the trial Judge to permit or reject such mode of examination. While we admit the correctness of the proposition, we are constrained to believe that the method of examination of the defendant and witness, Switzer, as disclosed on pages 34 to 36 of the printed record, is indefensible and ought not to be allowed.

The Court over the objection of appellant's attorney permitted the defendant, Switzer, to testify to the contents of a certain letter, which he claimed to have written to the appellant sometime in June, 1888, without first demanding the

original or producing a copy of the letter, (see page 36 of record) and this is assigned as error No. II.

On page 64 of the printed record, the Judge in his opinion and findings, after quoting from the correspondence between appellant and appellee, uses this language:

"In this there is no authority to purchase this interest in "the Burner Lode for any amount to exceed fifteen hundred "dollars. Defendant could not bind plaintiff by any purchase "of that lode which involved an expenditure of any sum to "exceed that amount. * * * * As far as plaintiff is "concerned, he was not bound by any purchase of that prop- "erty for two thousand dollars."

This finding or conclusion of the Judge is assigned as error No. IV. Let us examine into the correspondence of these parties and ascertain whether or not this conclusion reached by the Court is correct, or is supported by the facts in evidence. Beginning with the first letter, found on page 47 of record, the defendant writes:

"Mr. Wenham, if you have a friend who desires one "half of a good claim lying alongside of the Alta Lode, which "I think can be had for $1,500, I wish you would let me "know. Sometime ago I bought one half of it. It cost him "$2000.00 thousand, he is not a miner the ground is softer "formation than where I am running our tunnel and can be "worked very easily, its sloping toward the creek and adjoin- "ing so the ores can be all run from it and all concentrated

"through our concentrator. It slopes north to our south line "of the Alta while our ground slopes south so sloping to- "gether its cheap I think, two large veins run lengthwise "through it east and west, same course as ours and please let "me know from now until spring is the time to pick up "property cheap, if you think a sale can be effected I will "send you a copy or a plat of it as it lays adjoining our "grounds the Alta lode claim, then any one can come out or I "will get a deed of it in the bank and the exchange can be "made either way, and I will get it cheap as any price can be "had for it."

In this letter the defendant says he "thinks it can be got for $1500.00," but he also says that it is a good claim and cost the owner $2,000. There is no proposition that he can or will buy it for $1500.00. All that he really promises is that he will "get it cheap as any price can be had for it." To this letter the appellant says he answered making inquiries about the claim.

No other letter passes till March 7, 1888, when appellee wrote, *inter alia:* "I think you will do well to secure the interest I spoke of joining the Alta." On the 15th of the same month the appellant wrote: "Now about the claim "adjoining the Alta. *I want to go in with you.* Could the "interest be bought for $1000.00. Friend Whitney will be "out to see you soon, I think. We could work the claim "after the Monitor was well under way; I suppose you would

"be in no hurry to develop that claim till after the tunnel was "complete."

Here is a positive declaration of the appellant that he wanted to go in with the appellee in purchasing the claim adjoining the Alta, and making some inquiries as to what price could be secured, and the method of working the same. There is no limitation of price to be paid, only asking if it is possible to secure it for $1000; but at the same time assuring the appellee that he wants to buy the interest and go in with the appellee.

Again on March 26th, only eleven days later, he writes, among other things, as follows: "If you should get the claim "adjoining the Alta all right, there is no hurry, as we could "not work it for some time to come. I suppose we could "sink a shaft on it to pay ore for about $2000.00, and if we "got the ore it would pay us well if the ore was rich enough, "as transportation is so close at hand it would not cost us "much to get the ore to the mill." In this the appellant says directly and positively, "if you get the claim adjoining the Alta all right." He had never as yet been informed as to the exact price it could be bought for. He was told it cost the owner $2000.00, but Switzer, the appellee, *thought* it could be gotten for $1500.00; and after writing to the appellee in a former letter that he, the appellant, wanted to buy the interest and go in with the appellee he here writes that "if he should get the claim adjoining the Alta all right." Is there any limitation as to price given to Switzer, and is he not told

that his purchase would be "*all right?*" The appellee is both authorized to act for appellant, and is left unlimited and uninstructed as to the price to pay. Appellant seems to have relied upon the assurance of appellee that he would get it as cheap as possible.

Again on April 5th, 1888, the appellant writes to appellee (See page 52 of trans.,) and closes his letter with this inquiry: "How about the claim adjoining the Alta claim? Can you secure the one-half you spoke of? Let me hear from you soon as practicable." Here is shown an anxiety on the part of appellant to secure the one-half interest in the claim, and no limitation as to price is placed upon the appellee.

Now what is the next step in these negotiations? In the next letter of Switzer to Wenham, dated April 13th, 1888, (page 51 of record), appellee says: "And in relation to the "interest in the claim adjoining the Alta, it can't be had for less "than about $1500 dollars if it can be bought for any price "but I shall know in about 20 days and I will write you as "soon as I can get to know what I can let you have it for. "He may get excited and ask more. * * * One thing "more if you conclude to take the interest you better send "$1500.00 dollars to the First National Bank of Butte as if "you wait it may slip in other hands. I am good for all "you send me."

On the 23d of April, 1888, appellant writes to appellee (see page 52 printed record) as follows:

"Dear Sir: Yours of the 13th at hand and contents "noted. According to your wishes I enclose you $500 pay- "able to your order. This is a New York draft and is as "good as gold at the First National Bank in your city; in fact "the Banks prefer drafts to currency. Now if you go quietly "to work and not let the party who wants to sell get excited, "when he agrees to sell, give him the $500, to bind the bar- "gain, and you can telegraph me for the other $1000 which "I will send immediately on receipt of notice, and if you can't "buy all of his interest buy half of it." * * * * In "regard to the claim next the Alta please keep it confidential "until something is done; and by the way what is the name "of the claim?"

Here is a portion of the money forwarded to Switzer, with instructions how to proceed to purchase the property, and a promise to remit the balance if bargain is made, and positive instructions to buy the interest, and if unable to *get all of it to get one-half of the interest*. Is there any doubt of the willingness and desire of the appellant to procure this property? It may be and perhaps is true that appellant desired to purchase as cheap as possible, but he seems to trust that matter to the judgement of Switzer, who was on the ground and familiar with the property.

So far there is nothing in all this correspondence that could be distorted into the idea that Switzer was limited to $1500 as the price to be paid for the half intertest in the claim. Let us follow it to the conclusion. On April 28th,

1888, Switzer writes to Wenham as follows: (See record, p. 53.) "My Dear Sir—Yours of 23rd, 88, is received with "one check of $500 dollars on the First National Bank of "Cleveland, Ohio, the mining lode claim is known as the "Ontario or Burner Lode mining claim. Soon as I can hear "from the party the matter will be concluded: the money is "in Bank."

Here no complaint or objection is made on the part of appellee that $500 instead of $1,500 had been sent. *He agrees and promises to conclude the purchase as soon as he can hear from the party or owner.* The fact that only $500 was sent made no material difference. The appellee said he understood appellant was a monied man (see page 36 of record.) For this reason we presume the appellee found no fault, and was willing to make the purchase and rely on the appellant to pay the balance of the price, whatever it might be.

On the 5th of June, 1888, the appellee wrote to the appellant (see p. 54 record):

"In relation to the Burner mining property I have got it "all and paid for it, and surveyed it for patent but am doing "$100 worth of work so as to have over $600 worth of work "which will be a necessary improvement. I am sure of two "veins on the ground. But it cost more than $1,500. It all "cost me about $4,000 all told, but I was determined to have "it if it cost more. It will pay to hold when patented. "Property is rising in Park Canyon. Under the circumstan-

"ces I had to take a deed in my own name, and of course had "to pay for it on delivery of the deed, and came near "losing it at that; others would take it at higher figures. "Now, friend A. A. Wenham, send me $1,500, and I will "make you a deed of one undivided one-half of the entire "Burner property free of all work excepting the one hundred "which I am now doing, which work will be over $600—suf- "ficient to get the patent; then you will have to stand one- "half the expenses of the patent which only is the regular "prices in this district and territory. As I have received $500 "of you, so the balance, $1,500, will make the purchase money "of your part $2,000. I will (write) you more in detail next "letter."

In this letter the appellee discloses all through it the fact of his agency, and acknowledges that the $500, theretofore received, by him from the appellant, had been applied toward the payment of the purchase price of the half interest bought for the appellant. Herein he also discloses the full cost as being $2,000.00, and promises to make a deed on receipt of the balance, $1,500. Nor does the appellant indicate any time within which the money advanced by him should be repaid by the appellant. This is the last letter written until April 6, 1889. It is true the appellant says he wrote ratifying the action of the appellee in the purchase, and asking for plat and description of the property, and asking the full amount of balance due, including assessment work and cost of procuring patent; and the defendant testifies to writing a letter stating

the money must be paid in thirty days. These two letters, if written were not received by either party. According to the evidence and considering the manner of defendant's testimony on this point it is doubtful if he ever wrote such a letter, and it is certain that the appellant never received it, for his refusal to send the money in thirty days if he had received such notice would be wholly inconsistent with his previous conduct and anxiety to purchase the property, especially as he had advanced already $500 and balance was only $1500. So we can confidently dismiss this point with the statement that the defendant never wrote demanding the money in thirty days, and that the finding of the Court that the plaintiff or appellant was not bound to take the property at the price of two thousand dollars is erroneous, and is not supported by the weight of evidence and is against the law as correctly applied to the facts. The principal is always bound by the acts of his agent when his acts are within the scope of his authority, whether the agent be general or special.

Pomeroy's Equity Jurisprudence, Vol. 2, Sec. 959.
Kent's Com., Vol. 2, side page 614, et seq.
Story on Agency, Secs. 170 and 373.
Am. and Eng. Cy. of Law, Vol. 1, page 428.
Muller vs. Pondix, 55 N. Y., 340–1.
Travis on the Law of Sales, Vol. 1, pp. 591–2.
Law vs. Cross, 1 Black, 533–6, U. S.
Hoyt vs. Thompson, 19 N. Y., 218.

The fact that the appellant was informed by the letter of June 5th, 1888, written by the appellee, and giving in full

detail the purchase he had made and the price paid for the property, and that after being thus informed of the transaction, he remained silent knowing that defendant had paid two thousand dollars for the property, and that he did not immediately repudiate the acts of defendant in making the purchase, bound him to take the property at the price paid by the appellee or defendant. On this point the Supreme Court of the United States in Law vs. Cross, 1 Black 533, says: "When informed by his agent of what he had done, if the "principal did not choose to affirm the act, it was his duty to "give *immediate* information of his repudiation. He cannot, "by holding his peace and apparent acquiescence, have the "benefit of the contract if it should afterwards turn out to be "profitable, and retain a right to repudiate if otherwise. The "principal must therefore, when informed, reject within a rea- "sonable time, or be deemed to adopt by acquiescence. The "rule is said to be a stringent one upon the principal in such "cases, where with a full knowledge of the acts of the agent, "he receives a benefit from them, and fails to repudiate the "acts."

This rule of law is almost universal, and the citation of a few authorities, in addition to the above, we deem sufficient to sustain the position.

Field vs. Farrington, 10 Wallace, 141.
Southern Life Insurance Co. vs. McCain, 96 U. S., 84.
Travis on Sales and Collateral Subjects, Vol. 1, p. 626.
Hoyt vs. Thompson, 19 N. Y., 218.

Metcalf vs. Williams, 144 Mass., 452.
Foster vs. Rockwell, 104 Mass., 171-2.
Matthews vs. Fuller, 123 Mass., 446.
Lorie vs. North Chicago City Ry. Co., 32 Fed., 270,
Sherwood vs. Sissa, 5 Nev. 352.

Among other things the Court found that the appellant waited too long after knowledge of the purchase before ratifying the action of appellee and tendering the balance of the purchase money, and that there never was a ratification of the action of the defendant or appellee in making the purchase at the price of two thousand dollars. These conclusions of the Court are assigned as error in Assignments Nos. V. and VIII. and in the exceptions taken on the trial. These propositions have been more or less discussed in the preceding part of this argument, wherein we have sought to show that the plaintiff or appellant by his letters of instruction to the appellee, and by his silence in not repudiating the action of the defendant, bound himself to take the property and pay therefor the price paid by his agent.

In this case it is shown that the appellant as early as April, 1888, and before the interest in the Burner Lode was bought (See trans., p. 52), sent $500 to the defendant to be applied toward the purchase of the identical property, with instructions as to the method of proceeding. This money was received, and when the purchase was made the same was used by the defendant in part payment for the property. The residue of the purchase price was furnished by the defendant

out of his own funds. (See record, pp. 54-55.) This the appellee had a right to do, if he saw fit to advance the necessary funds: and he could look to his principal to be reimbursed, with interest on the sum advanced: and his measure of damages in such cases is the sum advanced, with lawful interest. and his commissions, if any; but in the present case there is no claim for commission, nor was the payment of commission for services considered or contemplated by either party. Therefore the only claim which the appellee could lawfully assert against the appellent on account of the transaction is the repayment of this sum with legal interest.

Story on Agency, Sec. 74, note.
Story on Agency, Secs. 335-338.
Meech vs. Smith, 7 Wend., 315.
Wharton on Agency and Agents, Chap. 5, Sec. 316.
Kent's Com., Vol. 2, side pp. 634.
Gillett vs. VanRensellaer, 15 N. Y., 399.
Sedgwick on Damages, 8th Ed. Vol. 1., Sec. 304.
Hidden vs. Jordan, 21 Cal., 93.
Green vs. Clark, 31 Cal., 591.
Marzion vs. Pioche, 8 Cal., 536.

Believing as we do that it is fully established that where an agent furnishes money or funds, or a part of the funds necessary to complete a purchase for the principal that his only right or claim is for the sum advanced, with interest, and his charges or commission if any there be, we will proceed to the consideration of other points and errors relied on.

In the VIth assignment exception is taken to the finding

of the Court that the defendant had no authority to pay more than fifteen hundred dollars for the half interest in the Burner lode claim. This question we have already discussed and quoted from the several letters, showing conclusively as we claim that there was *no limitation* on the appellee as to the price to be paid. In fact he was permitted largely to use his own discretion in the purchase, and having done so the appellant would be bound by the contract, even if he should try to avoid it, but in this case the appellant is not now and never has expressed any desire or shown any disposition to repudiate the action of the appellee in making the purchase. On the other hand the appellant is seeking in this case to compel the defendant or agent to comply with his own contract, and make a deed for the interest bought by the appellee for the use of the appellant. All of the purchase money expended by the defendant, together with legal interest at 10 per cent per annum, with sixty dollars additional, was paid and tendered to the defendant to cover all advances and interest. (See record, pp. 20 and 21, evidence of Stapleton); and in addition to this, one hundred and fifty dollars was tendered to cover one half of cost of assessment work and procuring a patent from United States.

Recurring again to the question of the ratification of the action of the appellee in paying two thousand dollars, the Court below uses this language: "As defendant had under-"taken to act as an agent for plaintiff, he was required to be "loyal to his trust, and not act for himself, but I do not

"think he was required to wait indefinitely to see whether "plaintiff would ratify his action in paying two thousand dol- "lars for the property. Plaintiff should have ratified the ac- "tion of the defendant within a reasonable time."

This language and the result reached by the Court is excepted to and assigned as error in assignments Nos. VIII., XI. and XII. Here the Court falls into the unaccountable error of supposing or assuming that after the plaintiff had been fully notified by his agent of what he had done in relation to the purchase of the property, and the price paid, that in order to confirm the acts of his agent it was necessary to give notice of his acquiescence in the terms of the transaction, when the law is directly contrary to this position; the true rule being that when an agent exceeds his authority or acts contrary to instructions or different from the usual custom or what might be expected under the known circumstances, if he notified his principal in full of all his actions, unless the principal immediately repudiates the same, he is deemed to have fully concurred in and ratified such act of his agent by his silence. (See authorities cited supra.) Plaintiff did not wait ten months to ratify the conduct of the defendant. The very fact that he did not at once repudiate the action of Switzer, upon notice from him of what he had done, was a complete legal and moral ratification of all the acts of the appellee. Suppose, for the sake of argument, that the defendant, Switzer, after having paid two thousand dollars for the property, and having written the letter which he did write on June 5th, 1888,

and receiving no answer from the plaintiff, should bring his action to recover $1,500, advanced by him on account of the plaintiff in this purchase, with interest thereon, and tender or offer to convey one-half the Burner Lode to Wenham, is there a Court of Equity in the United States that would not grant him relief instanter upon the facts as disclosed in this case? We think not. His rights and equities would be too clear to admit of doubt. Every jurist in the country would decide that Wenham's silence was a ratification of the actions of Switzer. How then can it be said that Wenham waited too long, or an unreasonable time to ratify. It might pertinetly be said that he had waited too long or an unreasonable time to repudiate. The maxim, *qui tacet consentire videtur*, or this—"*A man who does not speak when he ought shall not be heard when he desires to speak*," would apply to such a case with full force. Plaintiff's silence is regarded as a perfect ratification of the actions of Switzer, and in finding there was no ratification by Wenham of the purchase as consummated by defendant, the Court committed an error of law from which appellant asks to be relieved.

The learned Judge also made another finding and decision subject to a legal criticism, which we claim ought to entitle the appellant to a judgment on the facts. It is shown in appellee's letter of June 5th, 1888, that he used $500 of the appellant's money and fifteen hundred dollars of his own funds in paying for the half interest in the mine. The Court says as follows: "It appears to me the delay of about ten months

"in ratifying the action of defendant by plaintiff as he should "have done by paying to defendant the money he had ex- "pended, was unreasonable, and that *defendant had the right* "to maintain that plaintiff had left him to shoulder the respon- "sibility he had assumed, and *to treat the purchase as his own.*"

Here as before the Court assumes there was no ratification or responsibility assumed by the silence of the plaintiff, whereas we have fully shown that silence was one of the very best ways of ratifying defendant's actions. But this is not the worst feature; the Court says: "The *defendant had the right* "to maintain that plaintiff had left him to shoulder the respon- "sibility he had assumed and to *treat the purchase as his own.*" This doctrine announced by the Court, if adopted, would lead to much fraud and confusion, and the rights of parties as principal or agent could and most frequently would be decided by the whims and caprices of human nature. The relation of the agent to the principal is not unlike the position of trustee and *ces tue que trust*, and where real estate or lands has been purchased by the agent for the principal with funds partly furnished by his principal and the residue advanced by the agent, and the agent takes the title to such lands in his own name, he holds such title in trust for his beneficiary, nor can he at his own instance, without notice to the principal, renounce his agency or trust and treat the purchase as one originally made for himself. In such cases the utmost good faith and loyalty to the interest of the principal must be

shown. And the agent or trustee cannot betray his trust and take advantage of his position.

Heldman vs, Mesmer, 75 Cal., 170.
Walton vs. Karnes, 67 Cal., 257.
Royd vs. McLean, 1 John. Chan., 582.
Story's Equity Jurisprudence, Vol. 2, Sec. 1201.
Boskowitz vs. Davis, 12 Nev., 457-8.
Hardenbergh vs. Bacon, 33 Cal., 356.
Rubidœx vs. Parks, 48 Cal., 215,
Rothwell vs. Dewees, 2 Black, 613, U. S.
Massie vs, Watts, 6 Cranch, 148.
Dutton vs. Willner, 52 N. Y., 319.
Story on Agency, Sec. 207.

The agent stands in the relation of a trustee, and if such relation is once established it continues as long as he has possession or control of the particular property about which the trust arose. The agent may have a lien on the property or estate in his name or possession for the advancements made, but he cannot violate his trust and assume to act for himself, though he might offer to return the principal's funds used in making the purchase. The principal is entitled to all the benefits accruing by reason of any transaction of his agent, and the agent must always account to the principal for property purchased in his behalf. Nor can he appropriate his principal's property, or sell the same at his own instance to secure advances made by him, without first demanding the same of his principal, except in matters governed by custom or law merchant.

In the case at bar, although the defendant, Switzer, advanced a portion of the money to buy the one-half of the Burner Lode Claim in June, 1888, he never demanded the same nor complained of the non-payment for one whole year. No letter or correspondence passed between the parties, *that is proven* by a bare preponderance of the evidence, until April 6th, 1889, when plaintiff wrote making inquiry why he had not heard from defendant and enclosing one thousand dollars to the appellee. (See record, p. 55). This letter was received by the defendant at Butte City, Montana, it is to be presumed, in the usual time of transmitting a letter from Cleveland, Ohio, to Butte, Montana, and yet it remains unanswered until May 30th, 1889, or nearly two months after its receipt, and in all this dreary silence from June 5th, 1888, to May 30th, 1889, the defendant had not demanded the amount advanced by him, nor had he offered to return the five hundred dollars advanced by Wenham and used by the defendant in purchasing this property. And in his letter of May 30th, 1889, he does not intimate that he had notified Wenham that the money must be paid in thirty days. Such conduct is inexplicable with the statement that he wrote stating the money advanced by him must be returned within thirty days. Even after receiving the one thousand dollars, inclosed in letter of April 6th, 1889, it seems to have taken nearly two months for the defendant to make up his mind to violate his contract. But as he testified in his cross-examination that property was rising in Park Canyon (See printed record, p. 40) we pre-

sume this may have had something to do with his final decision not to make the deed, although he denies the soft impeachment.

There is one other question we simply desire to refer to, and it is this.—In the bill it is alleged that the contract between the plaintiff and the defendant was that defendant was to purchase the Burner Lode Claim; one-half of which claim was to be bought for the benefit of the plaintiff. There was a slight variance between this and the proof, as the evidence tended to show that the defendant had already bought one-half of the claim for himself, and the real fact is he undertook to buy the other half for the plaintiff. This variance we do not deem material or fatal, because the object of the suit is to recover or compel the defendant to convey one-half of the mine to the plaintiff, the contract of agency in any event as between the plaintiff and the defendant effects only one-half of the Burner Lode Claim, and it was not material whether the half purchased for the plaintiff was bought by the defendant at the same time he bought one-half for himself, or at a different time. It did not change his contract to buy *one-half* for the plaintiff. One-half of the claim is all that is involved in this suit, and one-half of the Burner Lode is all that defendant ever agreed to purchase for the plaintiff. It is immaterial whether he bought it at the same or at a different time from his own purchase of one-half, and the evidence, we contend, differing only in this respect from the bill, is immaterial. The defendant was not misled by the bill, nor was

there any objection or demurrer to the introduction of plaintiff's evidence or proof on the trial. It would seem to us that the failure of the defendant's counsel to object to the evidence, offered by the plaintiff in support of his bill (if there was any variance at all) would now preclude them from raising it here for the first time. We do not assume that the defendant's counsel will refer to or urge this question before this Court, but as the judge below incidentally refers to this matter, although not deeming it of sufficient force to base his opinion on, we have noticed it here.

The defendant made no objection to the contract as pleaded when he filed his answer in the cause. In fact, in paragraphs six, seven and eight of his answer, the defendant affirmatively admits that the contract as pleaded by the plaintiff, viz., *the purchase of the Burner Lode Claim* instead of a *one-half* thereof, to be the contract made. If the defendant meant to rely on, or take advantage of the difference between the contract as plead by the plaintiff, and the real contract as understood by the defendant, it was obligatory on him to plead the contract as understood by him and offer to perform it. This not being done, and no objection being interposed on the trial to the evidence offered by the plaintiff to support his bill, advantage cannot now be taken of this difference; but as the evidence introduced met with all the requirements of the prayer of the complaint, and the specific performance demanded and prayed for could be performed by the defendant, according to the proof offered, there was no

material variance between the facts as alleged in the bill and the evidence offered to support it.

Mortimer vs. Orchard, 2 Ves. Jr., 245.
London & Birmingham Railway Co., vs. Winter, Cr. & Phill., 57.
Smith vs. Wheatcraft, 9 Ch. D., 223.
Meaks Van Santvoord's Pleadings, pp. 832–838–9.
Crawford vs. The William Penn, 3 Wash. C. C., 484.
Meaks Van Santvoord's Pleadings, p. 845.
Story's Equity Pleadings, Sec. 394 (Note A.)

In the case of *Crawford vs. The William Penn, supra*, the Court laid down this rule in determining the matter of variance between the allegations in the bill and the evidence introduced: "If either party mistakes in setting out his cause "of action, and yet not so as to *mislead the other party*, the "Court will notwithstanding proceed to make a decree disre- "garding the variance between the pleadings and the proof."

In the case at bar there is no claim that the appellee was in any manner misled by the case as stated in the bill. There was no material variance to mislead, nor was objection made to the proof offered. This must have been done on the trial to avail here.

Maxwell on Pleadings, p. 571.
Bell vs. Knowles, 45 Cal., 193.
Tyng vs. Co. Warehouse Co., 58 N. Y., 308.
Chamblee vs. McKenzie, 31 Ark., 155.
Nelson vs. Thompson, 23 Minn., 508.

Believing that every possible objection to the case, as

made out by the plaintiff on the trial, has been covered by us in this, our brief, we ask that the judgment of the Court below be reversed, and a decree for the plaintiff be ordered in accordance with the prayer of the bill.

ROBT. B. SMITH,

Solicitor and Attorney for Appellant.